Supreme Court, U.S.
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No. 85-1796

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ROBERT C. HICKERSON, on his own behalf and on behalf of all others similarly situated,
Petitioner,
v.

VELSICOL CHEMICAL CORPORATION, a Delaware corporation; THE NORTHERN TRUST COMPANY, an Illinois banking corporation, as Trustee of the Velsicol Chemical Corporation Pension Plan; BEN W. HEINEMAN; PAUL J. WEIR; BERNARD FIRESTONE; ROBERT R. GARRISON; and THE RETIREMENT COMMITTEE OF THE VELSICOL CHEMICAL CORPORATION PENSION PLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I.

Is it appropriate for petitioners to raise new fact issues in this Court, on a subject that the Seventh Circuit has remanded to the district court for further proceedings?

II.

Does ERISA permit conversion of a defined contribution plan to a defined benefit plan where accrued benefits of participiants are preserved?

III.

Where such conversions are expressly authorized under ERISA, should common law trust principles be applied without regard to the Congressional purpose and comprehensive regulatory scheme expressed in ERISA?

IV.

Did the Seventh Circuit create a "reasonableness" exception to ERISA's prohibited transactions section?

V.

Did the Seventh Circuit correctly identify the nature of plan participants' ownership interests with reference to their accrued benefits rather than to the physical assets of the plan?

STATEMENT UNDER RULE 28.1

Velsicol Chemical Corporation is wholly-owned by Farley/Northwest Subsidiary Corporation, which is in turn wholly-owned by Farley/Northwest Industries, Inc. Farley/Northwest Industries, Inc. is at least 80% controlled by Farley/Northwest Holding Company, which is in turn at least 80% controlled by Farley Metals, Inc. Farley Metals, Inc. is privately owned, and controlled by William Farley. Affiliates of Velsicol Chemical Corporation are Farley Metals International, Inc., which is wholly-owned by Farley Metals, Inc.; Union Underwear Company, which is wholly-owned by Farley/Northwest Industries, Inc.; Acme Boot Company, which is wholly-owned by Farley/Northwest Industries, Inc.; Northwest Leasing Company, which is wholly-owned by Farley/Northwest Industries, Inc.; General Battery Corporation, which is wholly-owned by Northwest Leasing Company; Farley Acquisition Company, which is approximately 95% owned by William Farley; Condec Corporation, which is approximately 95% owned by Farley Acquisition Company; NRM Corporation, which is wholly-owned by Condec Corporation; Consolidated Controls Corporation, which is at least 90% owned by Condec Corporation; Lima Electric, which is wholly-owned by Condec Corporation; Farley Energy Corporation, which is 100% owned by William Farley; Coal Creek Mining Company, which is wholly-owned by Farley Energy Corporation; Clayts Coal Sales, Inc., which is wholly-owned by Farley Energy Corporation; Anaheim Citrus Products, which is 100% owned by William Farley; Farley Industries, Inc., which is 100% owned by William Farley; and Farley Investment Company, which is 100% owned by William Farley.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
Establishment of the Velsicol Plan	2
Pre-1975 Investment Experience of the Plan	3
Velsicol's Decision to Convert the Plan from a Profit Sharing Plan into a Pension Plan	4
Adoption of the Defined Benefit Pension Plan Structure by Velsicol	5
Treatment of the Profit Sharing Account Balances	7
Proceedings Below	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10
Petitioners Cannot Raise New Fact Issues in This Court	10
Traditional Trust Law Principles Cannot Be Applied Without Reference to ERISA	11
ERISA Permits Plan Conversions Where Accrued Benefits Are Preserved	12
The Self-Dealing Prohibitions of ERISA Do Not Bar Incidental Benefit to Employees in the Context of a Permitted Conversion	14
The Seventh Circuit Did Not Create A Reasonableness Exception to the Prohibited Transaction Section of ERISA	15
Plan Participants Owned Their Accrued Benefits, Not the Plan Assets	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Alessi v. *Raybestos-Manhattan*, 451 U.S. 504, 511-14 (1981)	12
Bianchan v. *McGraw-Edison Co.*, 438 F. Supp. 585, 588 (W.D. Pa. 1976), *aff'd mem.*, 564 F.2d 89 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978)	16
Dennard v. *The Richards Group, Inc.*, 681 F.2d 306, 310 (5th Cir. 1982)	15
Holliday v. Xerox Corp., 732 F.2d 548, 551 (6th Cir. 1984)	14
Salazar v. *Sandia Corp.*, 656 F.2d 578 (10th Cir. 1981)	12
United Independent Flight Officers v. *United Airlines*, 572 F.2d 1494 (N.D. Ill. 1983)	12
STATUTES:	
26 U.S.C. § 401	7
26 U.S.C. § 404(a)	2
26 U.S.C. § 412	6
29 U.S.C. §§ 1052-1056	6
OTHER AUTHORITIES:	
12 C.F.R. § 217.7(c)	3

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Velsicol Chemical Corporation, et al., submit this brief in opposition to the petition for writ of certiorari filed by Robert C. Hickerson.

STATEMENT OF THE CASE

Establishment of the Velsicol Plan

Velsicol established its retirement Plan in 1956 as a defined contribution profit sharing plan for eligible salaried employees. Under the Plan, Velsicol had the discretion to contribute between two percent and ten percent of its consolidated net profits for any given year (not to exceed the maximum amount deductible under Section 404(a) of the Internal Revenue Code of 1954, as amended). Amounts contributed to the Plan in any year thus depended upon the level of Velsicol's profits and the percentage of those profits Velsicol's management elected to contribute. The employees made no contributions to the Plan.

The amount of Velsicol's contribution for each year was credited to individual book accounts maintained for each participating salaried employee. The assets held in the Plan's trust fund were not earmarked for particular participants, but were maintained in a common pool for the benefit of a changing class consisting of those employees who were, from time to time, eligible to be participants of the Plan. The participants' accounts were periodically adjusted to reflect investment gains and losses experienced by the Plan's trust fund. Thus, for any given year, a participant's account might increase, decrease, or remain the same. Plan participants assumed not only the risk of Velsicol's profitability, which would affect the amount of Velsicol's contribution to the fund in any year, but also the risk of investment gains and losses with respect to the assets already in the fund. In any year in which investment losses exceeded Velsicol's contribution, participants' account balances would decrease.

Because the Plan was a defined contribution plan, no specific retirement benefit was guaranteed to Plan participants. Instead participants received whatever level of benefits were provided by their account balances at retirement. The Plan provided that the amount of a partici-

pant's account balance at retirement would be paid in one or a combination of the following ways, as determined in the sole discretion of the Plan's trustees.

(1) periodic installments over a period of up to 10 years, with the amount of each installment to be based upon the participant's account balance at retirement, plus simple interest fixed at the rate paid on saving accounts by the bank serving as custodian of the Plan's trust fund (5% annually at the time of the Plan amendment),[1] but without adjustment for post-retirement investment gains or losses, divided by the number of installments;

(2) by the purchase with such money of an annuity contract; or

(3) a single lump sum payment of such amount.

Under the Plan, participants' rights to such benefits became nonforfeitable *pro rata* over a 10-year period so that any employee who left Velsicol before completing ten years of service forfeited a portion of his account balance.

While Velsicol expected to continue the Plan indefinitely, it reserved the right to discontinue contributions to the Plan. Furthermore, the Plan provided that it could be wholly or partially amended, or otherwise modified, at any time.

Pre-1975 Investment Experience of the Plan

During the 18-year period from the time the Plan was established in 1956 until it was amended in 1975, the trust fund's investment earnings averaged 5.7% per year. Annual investment performance experienced great fluctuations, however. In 1971 investment gains were 20.55%. However, in the two years prior to amendment, the trust funds suffered losses—7.71% in 1973 and 19.44% in

[1] The maximum amount payable by banks on savings accounts under 12 C.F.R. § 217.7(c).

1974. Those losses reduced the account balances of all Plan participants and *permanently* reduced the retirement benefits of participants who terminated employment in 1973 and 1974.

Velsicol's Decision to Convert the Plan from a Profit Sharing Plan into a Pension Plan

Faced with the uncertainties and fluctuations in participants' account balances under the profit sharing plan structure, Velsicol management concluded that conversion of the Plan into a defined benefit pension plan would be in the best interest of Velsicol's employees. In a letter to Velsicol's employees dated March 28, 1975, Robert Morris, then President of Velsicol, explained the situation as follows:

> "As you can see, although Velsicol's dollar contribution from profits was the highest in our Company's history, the decline in stock market prices reduced our trust fund balance by over 19%. Although, thanks to careful management of our profit sharing fund investments, our fund performed better than the Dow Jones and Standard and Poor's indexes, the net result was still an overall decrease in employee account balances. And, unfortunately, this is the second year in a row that the stock market has offset most or all of Velsicol's largest profit contributions. One of the primary purposes of our Deferred Profit Sharing Plan was to enable participants to build-up sizeable nest eggs during their working years to provide retirement benefits and security at age 65. However, adverse fluctuations in company profits and stock market valuations over the past six months have repeatedly demonstrated that a profit sharing plan does not provide the dependable financial security and long range income assurance which employees require in retirement.
>
> To provide you with better security after retirement, I am pleased to announce that the present Deferred Profit Sharing Plan will be converted to and replaced

by a Pension Plan effective April 1, 1975. You and all other present profit sharing plan participants (except for certain international employees) will automatically become participants in the new pension plan as of that date."

Adoption of the Defined Benefit Pension Plan Structure by Velsicol

Under the "defined benefit" pension plan structure adopted by Velsicol, the benefits to be paid to participants are fixed as defined in the Plan—*i.e.*, dollars per month for life beginning at retirement. Annual contributions are made to the Plan by Velsicol in amounts computed by the Plan actuary so that the Plan's trust fund will have sufficient assets to provide those fixed benefits when they become payable. In contrast to the profit sharing plan structure, all investment risk under the Plan after its conversion into a pension plan is borne by Velsicol. Any investment losses increase the amount of Velsicol's contributions to the Plan, while investment gains reduce Velsicol's contributions. Investment gains or losses in the trust fund become irrelevant to the employees because they are guaranteed fixed benefits regardless of investment results.

This shifting of investment risk to Velsicol was obviously important to retiring employees whose retirement income was fixed under the profit sharing plan structure based upon their Plan account balances at the end of their year of retirement. These employees were particularly vulnerable to short term fluctuations in the Plan's investment performance. A harsh example of this vulnerability occurred just prior to the Plan amendment. Velsicol employees who retired in 1974 saw their retirement benefits cut by almost 20% from the amounts which they had expected to receive just a few months earlier.

Upon the conversion of the Plan into a pension plan, the discretionary nature of Velsicol's contributions ended,

and the risk of investment losses was transferred from the Plan participants to Velsicol. Velsicol became obligated to comply with the funding standards of Sections 302-306 of ERISA, 29 U.S.C. §§ 1052-1056, and Section 412 of the Code [2] and took upon itself the considerable potential liability under Section 4062 of ERISA to pay benefits if the Plan were ever terminated.

Under the Plan as amended, participants became entitled to a "defined benefit" at retirement. For each year of qualified service, up to a maximum of 25 years, a participant became entitled to a total retirement benefit [3] equal to 2% of his average compensation for the highest 5 consecutive years out of his last 10 years of employment. An employee qualifying for the maximum benefits under this formula would thus receive retirement income equal to 50% of his final average pre-retirement income.[4] Following amendment of the Plan, Velsicol requested a determination from the Internal Revenue Service that the amended Plan was in full compliance with the re-

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[2] The sections of ERISA referred to in this brief are the provisions of Title I and Title IV of ERISA, which are applicable to all defined benefit pension plans. The sections of the Code cited herein apply to tax-qualified plans such as the Velsicol Plan, which are subject to both the provisions of the Code and to the non-tax provisions of ERISA. Title II of ERISA amended many provisions of the Code applicable to tax-qualified plans; however, only the Code citation is provided for these provisions.

[3] Including a calculated portion of his social security benefit, according to the concept, customary in such plans, that the employer has provided, through the social sequrity tax imposed on employers, a portion of the social security benefit, which is part of the employee's total retirement income.

[4] As social security benefits were nontaxable and the balance of the total retirement benefit would normally be taxed at lower rates post-retirement (as the employee's total income normally falls after retirement), the practical result is to leave the employee with somthing more than 50% of his pre-retirement income on which to live.

quirements of Section 401 of the Code. The Internal Revenue Service issued a ruling to this effect on November 21, 1977.

Treatment of the Profit Sharing Account Balances

Prior to the conversion of the Plan into a pension plan on April 1, 1975, every participant with fewer than ten years of service would have forfeited a portion of his Plan benefits under termination of employment. As a part of the conversion, the claim of every participant, regardless of length of service, to his full Plan benefits became nonforfeitable. In addition, the Plan guarantees that the portion of participants' minimum benefits based on their account balances will increase at a rate of 5% compounded annually, without regard to the actual investment gain or loss of the trust fund. As of April 1, 1975, when this guarantee was put into effect, and as of today, there was, and remains, no way of knowing whether actual investment results between the date of the Plan amendment and the termination of the profit sharing participants' career with Velsicol will be less than, equal to, or in excess of the 5% guarantee. The investment risk was shifted from the Plan participants to Velsicol.

As it happened, the investment experience of the trust fund from the date of conversion to the present has been positive. From 1975 through 1981, the average return received on the trust fund was 11.55% per year. Earnings on the fund continued to fluctuate greatly, however. In 1975 the return was 25%, while the return was less than one percent in 1977. These historically high investment earnings were accompanied, if not occasioned by, historically high inflation. To the extent that inflation causes participants' compensation to increase to correspondingly higher levels, the further result was an increase in the "defined benefit" payable at retirement. In this way, higher investment returns were reflected directly in higher pension benefits.

These investment gains did not go unnoticed by the plaintiffs. While they were aware of the conversion of the Plan into a pension plan at the time that it occurred, and were aware that the investment risk had been shifted from them to Velsicol, litigation was not instituted until 6 years after conversion from the profit sharing structure to the pension plan structure.

Petitioners have asserted that Velsicol "fully expected" that the investment performance of the fund would nearly double its profitability, and that this expectation was the principal motivation for the Plan conversion. (Petition, pp. 7-8). The evidence before the district court did not support this conclusion, and the petitioners did not urge it at the district court level. Instead, the petitioners' position in their summary judgment motion was that, assuming Velsicol's actions were motivated by concern for Plan participants, the conversion from a defined contribution to a defined benefit plan was not permitted under ERISA. Thus, the motivation issue was not before the district court and was not decided.

Proceedings Below

Petitioners' theory below was that Plan participants had physical ownership of the assets in the Plan, and that this asset ownership precluded conversion of the Plan to a defined benefit plan which did not continue to credit participants with all investment results of the fund. The district court accepted this theory, and granted summary judgment to the petitioners:

> "The reasonablness of the return is not at issue. A 15% return would certainly be reasonable, but if 20% was earned on vested Profit Sharing Funds, ERISA and the profit sharing agreement mandate that participants receive those full earnings." (Petition, 41a.)

The Seventh Circuit reversed, holding that the participants did not have an ownership interest in the Plan

assets that would preclude conversion, though the participants did have a vested interest in their profit sharing plan account balances. (Petition, 11a.) In reaching this result, the court noted that nothing in the Plan documents or in ERISA or in its implementing regulations conferred such an ownership interest. Rather, the nature of the rights conferred by the Plan documents and ERISA was to the value of the accounts at the date of conversion. (Petition, 11a-17a.) The fundamental error of the district court was not in its analysis of trust law principles, but in its unsupported assumption that the nature of the participants' ownership interests could be determined by analogy to trust law principles rather than by reference to the Plan documents and to ERISA.

The Seventh Circuit held, however, that the reasonableness of the 5% guaranteed rate of return on the participants' account balances could not be determined on the record before the court, and remanded the case to the district court for further proceedings on this issue. Thus, the case has not yet reached final judgment disposing of all issues, and will not until after the proceedings are concluded on remand.

SUMMARY OF ARGUMENT

The Seventh Circuit has held that it is permissible under ERISA to convert a defined contribution plan to a defined benefit plan so long as accrued benefits of plan participants are preserved. However, because the record below was not sufficiently complete to permit a comparison of the value of participants' accrued benefits before and after conversion, the case was remanded to the district court for further proceedings.

While these rulings are important to the administration of employee benefit plans, they are not reasonably subject to dispute. The closeness of the case, as acknowledged by the Seventh Circuit, lay in the reasonableness of the guaranteed rate of return selected by Velsicol at

the time of conversion, an issue which the court left for determination by the district court in further proceedings.

Contrary to petitioners' argument, the Seventh Circuit did not hold that petitioners would have won under traditional trust law principles, but rather, that these principles were to be interpreted in the context of ERISA provisions expressly authorizing plan conversions. The Seventh Circuit did not create a reasonableness exception to ERISA's prohibited transactions section; it simply recognized that ERISA authorizes conversions that preserve the value of accrued benefits. Finally, the Seventh Circuit did not depart from established law in holding that participants did not own the physical assets in the profit-sharing trust fund. The plan documents, existing case law, and provisions of ERISA establish that participants owned their accrued benefits, not the plan assets.

ARGUMENT

Petitioners Cannot Raise New Fact Issues in This Court

Petitioners' theory below was that ERISA flatly prohibits conversion of a defined contribution plan to a defined benefit plan unless participants continue to bear the investment risk associated with the profit sharing plan assets. In their summary judgment motion, petitioners did not attack either the reasonableness of the 5% rate of return guaranteed by Velsicol or its motivation in converting the plan to a defined benefit mode, because these issues would necessarily have raised factual questions requiring a trial. Instead, petitioners pursued a *per se* violation theory which was adopted by the district court, but rejected by the Seventh Circuit. Petitioners now disingenuously argue that they should have prevailed below because Velsicol failed to prove by clear and convincing evidence the reasonableness of the 5% rate of return. (Petition p. 12) This was Velsicol's burden, petitioners assert, because Velsicol is a fiduciary and fiduciaries must justify their conduct.

Petitioners, however, cannot come to this Court seeking fact findings on issues not raised below, and concededly irrelevant to their theory of liability. If petitioners are asking this Court to adopt their *per se* violation theory, they must concede that neither reasonableness of the rate of return nor employer motivation is a relevant concern. Yet petitioners' argument is cast on the premise that the rate of return was unreasonable and that Velsicol sought to profit from the conversion. Neither the district court nor the Seventh Circuit held that Velsicol had any such motivation, nor that the rate of return was unreasonable. The Seventh Circuit did hold—contrary to petitioners' theory—that reasonableness of the rate of return is an issue which is relevant, but which must be decided on remand to the district court because the record was incomplete on this issue. The Seventh Circuit also ruled that determination of the reasonableness of the rate of return is to be made in light of economic conditions prevailing in 1975 when the conversion occurred, and not with the type of hindsight analysis offered by petitioners.

In reaching this result, the Seventh Circuit recognized that conversion of a defined contribution plan to a defined benefit plan is expressly contemplated under ERISA, and that it is not an act of self-dealing for employers to shift the investment risk associated with defined contribution plans from the employees to the employers in converting to a defined benefit plan so long as a reasonable rate of return is selected.

Traditional Trust Law Principles Cannot Be Applied Without Reference to ERISA

Petitioners are entirely correct that traditional trust law principles cannot blindly be applied without reference to ERISA. Contrary to petitioners' argument, the Seventh Circuit correctly discerned that ERISA leaves to employers flexibility to design and change employee benefit plans so long as accrued benefits are preserved.

This Court recognized this aspect of ERISA in *Alessi* v. *Raybestos-Manhattan*, 451 U.S. 504, 511-14 (1981):

> . . . what defines the content of the benefit that, once vested, cannot be forfeited? ERISA leaves this question largely to the private parties creating the plan. That the private parties, not the Government, control the level of benefits is clear from the statutory language defining nonforfeitable rights as well as from other portions of ERISA. ERISA defines a "nonforfeitable" pension benefit or right as "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. § 1992(19) . . . . Similarly, the statutory definition of "nonforfeitable" assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the amount. As we explained last Term, "it is the claim to the benefit, rather than the benefit itself, that must be "unconditional" and "legally enforceable against the plan" . . . .

The same principle has led courts to reject challenges to the decision-making processes of plan fiduciaries in *Salazar* v. *Sandia Corp.*, 656 F.2d 578 (10th Cir. 1981), and in *United Independent Flight Officers* v. *United Airlines*, 572 F.2d 1494 (N.D. Ill. 1983).

ERISA Permits Plan Conversions Where Accrued Benefits Are Preserved

The appropriate inquiry under ERISA is whether, upon conversion, accrued benefits of employees have been preserved. In order to satisfy this inquiry it is necessary first to determine what benefits are accrued at the time of conversion, and then to determine whether the new plan preserves those benefits. While this would seem so obvious as to be a truism, both the timing of the com-

parison and the nature of the accrued benefits to be compared presented difficulties to the district court because it confused the right to accrued benefits under a retirement plan with rights a trust beneficiary might have in circumstances involving a non-employment related common law trust, *e.g.*, a trust established by a father for his son.

At the time of conversion, the participants' accrued benefits consisted of the amounts of their account balances at retirement, to be paid at the discretion of the plan trustees, (a) in periodic installments over a period up to 10 years at 5% interest, (b) by the purchase of an annuity contract or (c) by a single lump sum payment. The Seventh Circuit held that the record below was not sufficiently complete to permit a comparison of the value of these accrued benefits with the total package of benefits that the participants were provided under the benefit plan after conversion. The reason that the record was incomplete was that the petitioners never addressed the issue of preservation of accrued benefits prospectively at the time of conversion. Instead, they focused upon the fact that, subsequent to conversion, the actual investment experience of the fund exceeded 5%. This approach enabled the petitioners to claim that there were excess earnings which belonged to the class members. However, the plan participants did not own the fund; they owned their rights to accrued benefits. So long as their accrued benefits were preserved in the context of the defined benefit plan, the investment performance of the fund following conversion was irrelevant to petitioners since they had no vested right to continue to participate in the investment performance of the fund in the future. ERISA does not require that, upon conversion of a profit-sharing plan to a defined benefit plan, the assets of the profit-sharing plan must continue to be segregated and held in trust solely for the benefit of the participants in the profit-sharing plan. The funding requirements of the defined

benefit plan are determined by actuarial computation of the accrued future liabilities of the plan, and the assets of the defined benefit plan are deemed available to pay benefits to all employees covered by the plan. The defined benefit structure is completely independent of the investment gains or losses on the assets of the defined benefit plan.

The Self-Dealing Prohibitions of ERISA Do Not Bar Incidental Benefit to Employees in the Context of a Permitted Conversion

Petitioners have also misread the prohibitions of ERISA against self-dealing when applied to conversion of a defined contribution plan to a defined benefit plan. The language of ERISA stating that "the assets of a plan shall never inure to the benefit of any employer" cannot be read as a prohibition against decisions of an employer with respect to a pension plan which have the primary purpose and effect of benefiting the employees, and in addition the incidental side effect of being prudent from the employer's economic perspective. *Holliday* v. *Xerox Corp.*, 732 F.2d 548, 551 (6th Cir. 1984). Petitioners' self-dealing argument is focused entirely upon the assumed benefit to Velsicol that flowed from the fact that investment gains exceeded 5%, on average, in the years following conversion. The issue is not whether the employer may have realized some incidental benefit from a plan conversion or amendment, but instead, whether accrued benefits of employees are preserved. As the court noted in *Holliday*, Congress did not intend ERISA to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interest of the preservation of the fund and are also not adverse to the employer's interest. (732 F.2d at 552).

The Seventh Circuit Did Not Create a Reasonableness Exception to the Prohibited Transaction Section of ERISA

Nor has the Seventh Circuit created a reasonableness exception to the prohibited transaction section of ERISA, as petitioners argue. The Seventh Circuit held that an accrued benefit consisting of a participant's account ballance in a profit-sharing plan is preserved upon conversion to a defined benefit plan if the participant is guaranteed a reasonable rate of return on his account balance or if the total package of benefits provided to the participant equals or exceeds that account balance. The fallacy of petitioners' argument lies in their failure to focus upon the requirement in ERISA that accrued benefits be preserved at the time of conversion. Again, petitioners have attempted to apply common law trust principles without recognizing the interrelationship among the various provisions of ERISA. The prohibited transaction section cannot be read independently of those sections of ERISA which permit conversion so long as accrued benefits are preserved.

Plan Participants Owned Their Accrued Benefits, Not the Plan Assets

The only effort made by participants to focus on the accrued benefit issue is their assertion that the plan participants had ownership of the physical assets of the profit-sharing plan, and thus, indefeasible rights to all future earnings from those assets. (Petition pps, 20-26). Petitioners argue that the Seventh Circuit departed from existing law in rejecting their theory, but the petition cites no law except for an ambiguous *dictum* in a Fifth Circuit decision comparing the allocation of investment earnings in a profit-sharing plan to the receipt of interest on a bank account. *Dennard* v. *The Richards Group, Inc.*, 681 F.2d 306, 310 (5th Cir. 1982). While the Seventh Circuit acknowledged that there was relatively little

authority on this issue, it correctly concluded that the most relevant cases suggested that participants have only a right to the value of their accounts determined as of the date of conversion. (Petition, 12a, citing *Bianchan* v. *McGraw-Edison Co.*, 438 F. Supp. 585, 588 (W.D. Pa. 1976), *aff'd mem.*, 564 F.2d 89 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978). The Seventh Circuit also recognized that the provisions of the profit-sharing plan itself were inconsistent with the notion of an ownership interest by plan participants in the actual assets of the funds. (Petition, 12a-15a). Petitioners acknowledge these provisions, but assert that the profit-sharing plan also provided that the trust fund could not be used for any purpose other than for the exclusive benefit of the participants. (Petition, 21). Petitioners, however, have simply ignored the Seventh Circuit's conclusion that the term "participants", as used in the profit-sharing plan, includes participants in the plan both before and after it was amended, and hence, includes all Velsicol employees that, are covered under the defined benefit plan. Petitioners conceded below that the assets of the plan were used for the exclusive benefit of the larger group of participants, but claimed that only those participants in the plan at the date of conversion were entitled to share in the earnings of the trust fund at that date. No rationale is suggested by petitioners as to why such a restrictive reading of the term "participants" would be appropriate, and none exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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